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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LARRY D. BISHOP et al., Defendants and Appellants.	B282217 (Los Angeles County Super. Ct. No. GA088554)

APPEAL from judgments of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed in part and remanded with directions.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Larry D. Bishop.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant Jerron Harris.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Larry Bishop and Jerron Harris (together, Defendants) of various crimes, including first degree murder and attempted murder, arising out of gang-related shootings on December 25, 2012. On appeal, Defendants contend their convictions must be overturned due to juror and prosecutorial misconduct, and because the trial court erroneously (1) excluded third-party culpability evidence, (2) admitted and excluded certain jail telephone calls, (3) limited a defense expert's testimony, (4) modified, and refused a request to modify, certain jury instructions, (5) failed to give unanimity and accessory after the fact jury instructions, and (6) responded to a jury question in a misleading manner. Defendants also challenge their sentences on various grounds. We remand the cases for resentencing pursuant to Senate Bill No. 620 (2017–2018 Reg. Sess.). We affirm the judgments in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

Bishop and Harris were jointly charged by information with the murder of Victor M. (Pen. Code, § 187, subd. (a);[1] count 1); attempted premeditated murder of Damion T. (§§ 664/187, subd. (a); count 2); two counts of shooting at an inhabited dwelling (§ 246; counts 3, 4); and possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 6 [Bishop], 7 [Harris].) The information alleged drive-by shooting and gang-murder special circumstances as to count 1. (§ 190.2, subds. (a)(21), (a)(22)). As to counts 1 through 4, the information alleged that a principal personally and intentionally discharged a firearm in the commission of the crimes, causing great bodily injury or

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[1] All further unspecified statutory references are to the Penal Code.

death (§ 12022.53, subds. (d) & (e)(1)). As to counts 1 through 6, the information further alleged that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). Finally, as to count 6, the information alleged that Bishop had served a prior prison term (§ 667.5, subdivision (b)).

The case was first tried to a jury in 2015. The jurors were unable to reach a consensus on any counts, and the court declared a mistrial. The case was retried to a jury over the course of 45 days in 2016.

Prosecution Evidence

The Shootings

On the morning of December 25, 2012, Damion T., Tracy Y., and Jordan B. were at Damion's grandmother's house on Newport Avenue south of Wyoming Street in Pasadena. According to Tracy, she was pregnant at the time and Damion was the father.

Damion, Jordan, and Tracy left the house in a red Ford Focus, which Damion drove to Aubrey F.'s house in nearby Altadena. Damion, Jordan, and Aubrey were members of the Squiggly Lane Gangsters gang (Squiggly Lane). When they arrived at Aubrey's house, Tracy was crying and Damion and Jordan looked nervous. Aubrey advised them to go home, and they left in the Focus.

Shortly before 11:00 a.m., Damion drove through an area controlled by the Projekt Gangsters (Projekts). The Projekts is a sub-group of a larger gang called the Pasadena Denver Lane Bloods (PDL), which is a rival to Squiggly Lane. Tracy saw a group of men outside a laundromat pointing and yelling "get them, blood, get them, blood," which she understood to be a threat. A green Nissan Altima pulled out of the laundromat

parking lot and began to chase the Focus. Tracy recognized one of the men in the Altima as a PDL gang member.[2]

Damion eventually lost the Altima and drove back to Aubrey's house. Aubrey got in the backseat of the Focus, next to Jordan. According to Tracy, Aubrey had a nine-millimeter handgun.

Damion drove to his grandmother's house and Tracy went inside. Aubrey and Jordan remained in the car, and Damion drove them north on Newport toward Wyoming. As the car approached the intersection, Aubrey saw a dark sport utility vehicle (SUV) "on standby" on Wyoming. The SUV was later identified as a Chevrolet Captiva.

As the Focus entered the intersection, Aubrey heard gunshots and saw two African-American males shooting from the Captiva. Damion accelerated across the intersection, and the Captiva struck the Focus twice on the left side. Aubrey heard more gunshots and felt bullets hitting the left side and back of the Focus. Damion's head was down, but the Focus was still moving and crashed into a light pole. Damion was shot in the back of his head. The bullet struck his visual cortex, which left him blind in one eye.

While this was happening, Victor M. was outside his home near the intersection of Newport and Wyoming, saying goodbye to a family friend who stopped by to drop off Christmas presents. Victor was struck in the forehead with a stray bullet, which was fatal.

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[2] Tracy identified the man as Telley A. Telley, however, was wearing a GPS monitor at the time, which indicated he was not at the laundromat or involved in the chase.

At the same time, Carlos M. was in his house near the intersection and heard a loud thumping noise. Carlos went outside and found a bullet fragment on his porch. Gabriel P. was also in his house near the intersection and heard a loud blast. Gabriel went outside and saw a bullet hole on the wall to his house.

Surveillance Videos

A video from a neighbor's surveillance camera revealed that the collision and shootings took place at 11:09 a.m. A different surveillance camera captured the sound of gunshots. A few seconds later, the damaged Captiva can be seen travelling south on Mentone Avenue at a high rate of speed. Mentone is one block east of Newport.

Evidence Tying Bishop to the Captiva

About a month before the shootings, Bishop's friend, David M., rented him a gray Captiva from Enterprise Rent-A-Car (Enterprise). David rented the car because Bishop was too young to rent a car himself. Bishop accompanied David to Enterprise and paid for the car. David drove the car off the rental lot, but then turned it over to Bishop. David only saw the car "a couple times" afterwards.[3]

On November 28, 2012, a Glendale police officer conducted a traffic stop of the Captiva. Bishop was the driver and Christopher C., who was a PDL gang member, was a passenger. On December 21, 2012, an undercover Pasadena detective observed Bishop driving the Captiva.

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[3] On one occasion, David thought he saw the car being driven by someone other than Bishop.

A few minutes before the shootings, Darcy B. was packing presents in her car outside her home on Mentone. Darcy saw a gray SUV—which she later identified as a Captiva—travelling north on Mentone going approximately 50 to 60 miles per hour. When the SUV was about 10 feet away, Darcy made eye contact with the driver. The driver shook his head side-to-side, which Darcy interpreted to mean she should mind her own business. The SUV drove one block north of Wyoming, and then made a left turn. A few days later, a police officer showed Darcy a "six-pack" photographic array, and she identified Bishop as the driver of the car.[4]

About an hour or so after the shootings, Bishop drove a motorcycle to his friend Jose M.'s house in La Puente. Bishop told Jose he had crashed his "Tahoe,"[5] and asked Jose if he knew any tow truck companies or places he could get parts for the car that would be open on Christmas. Jose told Bishop nothing was open.

Sometime between 11:00 a.m. and 1:00 p.m. on the day of the shootings, Terry S. noticed an unfamiliar SUV parked near her home on Kipling Avenue in Eagle Rock, which is a Los Angeles neighborhood bordering Pasadena. The vehicle was uncovered. Later that night, D.G., another Kipling Avenue resident, noticed the vehicle parked on the street, but it was now covered.

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[4] Darcy identified Bishop at trial. She was unable to identify him, however, at the preliminary hearing in 2013.

[5] Three days before the shootings, a police officer made contact with Bishop while he was driving a black Chevrolet Tahoe.

The day after the shootings, Victor S., who worked for Ruzo Towing, received a call to tow a vehicle in Eagle Rock. Victor met up with Bishop, who identified himself as the owner of the vehicle. Bishop was riding a motorcycle and led Victor to Kipling Avenue, where the Captiva was parked and covered. Bishop told Victor he did not have the keys and needed to pick them up in Pasadena. Victor eventually towed the Captiva to a repair shop called B & K Auto Body (B & K Auto) in Pasadena.

Around 1:30 p.m. on December 26, an Enterprise branch manager contacted Bishop's friend, David M., and told him he needed to return the Captiva. David eventually told the manager his friend had the car and he had not seen it for two weeks. Enterprise reported the Captiva as stolen and activated the vehicle's On-Star GPS system, which indicated the Captiva was located at B & K Auto.

Around 4:30 p.m. on December 26, Bishop sent David M. a text message stating, "Aye, tell them it was stolen Saturday morning. You got drunk and left the keys in overnight."

Damion's Identification of Harris as the Shooter

According to Tracy, when she learned that Damion had been shot, she immediately went to the intersection and rode with Damion in the ambulance to the hospital. The hospital wanted to treat Tracy, but she refused and signed an affidavit stating so. While in the hospital, Damion told Tracy "Ronnie Ron" shot him, which he wanted his kids to know in case he died.[6] "Ronnie Ron" is Harris's nickname.

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[6] Damion denied making these statements and denied knowing to whom the name "Ronnie Ron" refers.

Harris's Statements to Police

Harris denied to police that he was involved in the shootings and told them he was in Fontana at the time. Harris said his friend Lance had a Captiva, and he would not be surprised if Bishop had driven it. Harris admitted he had been inside the Captiva one time while his lip was bleeding, but he could not recall being in the car on the day of the shootings. Harris told police "Ronnie Ron" is a family name.

Cell Phone Evidence

Records showed Bishop's phone and Harris's phone called one another five times between 10:42 a.m. and 10:58 a.m. on the day of the shootings. There was no activity on either phone between 10:58 a.m. and 11:15 a.m. At 12:37 p.m., Harris's phone made a 45 second call to Bishop's phone.

The day after the shootings, between 10:00 a.m. and 1:15 p.m., Bishop's phone made five calls to Ruzo Towing. Bishop's and Harris's phones made several calls to each other during that time period. Harris's phone also made calls to Ruzo Towing and B & K Auto.

Ernest Koeberlein, a digital forensic expert, analyzed data recovered from Bishop's phone. He determined that the phone performed Google searches for "B and K Auto Body" and "towing services." Harris's phone number was stored on Bishop's phone under the name "Roni Ron2." Bishop's phone had also taken a screen shot of a news article related to the shootings.

F.B.I. Special Agent Michael Easter analyzed cell site information and call detail records for Bishop's and Harris's phones. Easter concluded the phones' activity was consistent with them being in the area of the shootings shortly before

11:00 a.m. on December 25, and then travelling south on Mentone shortly after the shootings.

Easter determined that Harris's phone arrived in Fontana around 1:00 p.m. on the day of the shootings, and stayed there until around 5:30 p.m. The phone returned to Pasadena around 6:40 p.m. that evening.

Easter further determined that Bishop's phone's activity was consistent with it being at Kipling Avenue in Eagle Rock around 3:00 p.m. on the day of the shootings. The next day, Bishop's phone was again in the Eagle Rock area in the early afternoon, and then moved to an area near B & K Auto.

Physical Evidence

Police recovered from the intersection of Newport and Wyoming a front car grill that was determined to have fallen off the Captiva. Police also recovered from the intersection numerous expended .40 and .45-caliber shell casings. Underneath the windshield wiper of the Captiva, police recovered an expended .40-caliber cartridge casing. Inside the Focus, on the left rear passenger floor, police recovered an expended nine-millimeter Luger cartridge casing.

After analyzing this evidence, firearm examiner Ivan Chavez determined there were at least two .45-caliber firearms and one .40-caliber firearm used at the scene of the shootings. Chavez opined that the locations of the .40-caliber casings were consistent with a gun having been fired by the driver of the Captiva toward the Focus while the Captiva was travelling east on Wyoming. He also opined that a bullet hole discovered in the Captiva's side mirror was consistent with a gun having been fired from inside the Captiva. Chavez concluded the bullet that struck Damion was fired by a .45-caliber Glock pistol, and the two

bullets that struck houses on Newport were fired by a .40-caliber firearm.

Criminologist Joseph Cavaleri concluded there was gunshot residue present in the interiors of the Captiva and Focus, which was consistent with guns having been fired from inside both vehicles. Cavaleri also found gunshot residue on a black glove and a multi-colored gardening glove found inside the Captiva, which was consistent with the gloves having been worn while firing a gun. Cavaleri could not say when or how the residue was deposited on any of the surfaces.

Fingerprint Evidence

David Ozeta, who is a forensic identification specialist, conducted a latent fingerprint investigation of the Captiva. He determined Harris left two fingerprints on the front passenger side door frame above the door handle. Ozeta also concluded there were fingerprints inside the vehicle belonging to four other individuals—Shane P., Cornell D., Ruben T., and Edward M. — all of whom were PDL gang members.

DNA Evidence

Criminalist Wilson Voong analyzed various DNA samples collected from the Captiva. Voong concluded Bishop's profile matched the profile for the major contributor to samples taken from the Captiva's steering wheel and rear driver side exterior door.[7] DNA from at least two other unknown individuals was present in those samples as well. Voong concluded Harris's profile matched the profile of the major contributor to a sample taken from a multi-colored gardening glove found on the front

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[7] The random match probability of a major contributor profile is one out of 594 quadrillion black individuals.

passenger floor. DNA from at least two other unknown individuals was present in that sample as well. Voong determined Shane P. and Telley A. were possible contributors to other DNA samples taken from the vehicle, including a sample taken from the gear shift. In addition, it appeared that Christopher C.'s DNA profile matched the profile of a sample collected from a toothpick found on the driver's seat of the Captiva.

Bishop's Phone Call From Jail

On January 30, 2013, Bishop made a phone call from jail to his cousin, Christopher C. During the call, Christopher asked Bishop how his case was going, to which Bishop responded, "we filing some motions and shit that . . . that should be coming through but shit . . . Like I say shit true. [¶] You heard me? Shit true."

Gang Evidence

The prosecution's gang expert, Carlo Montiglio, testified that PDL is a violent street gang with primary activities that include pimping and pandering, narcotics sales, burglary, fraud, armed robbery, assault, attempted murder, and murder. PDL gang members commit crimes to build their reputation and influence within the gang.

In 2012, there was an ongoing "war" between PDL and Squiggly Lane, which resulted in multiple shootings and assaults. At the time, PDL was a much larger gang, with as many as 300 members. Squiggly Lane, in contrast, had only 20 or 30 members.

Montiglio opined that both Bishop and Harris were members of PDL in 2012. He based his opinion on the facts that Bishop and Harris had numerous PDL tattoos, wore gang-related

clothing, associated with known PDL members, and had previously been contacted in PDL areas. Montiglio also opined that Damion T., Aubrey F., and Jordan B. were active members of Squiggly Lane in December 2012.

When presented with a hypothetical mirroring the facts of this case, Montiglio opined that the murder and attempted murder were committed for the benefit of, at the direction of, or in association with a criminal street gang with a specific intent to promote further gang conduct by gang members. Montiglio explained that the shootings were committed as retaliation for gang members driving through a rival gang's territory.

Defense Evidence

Bishop called as a witness the custodian of records for the hospital where Tracy Y. claimed she received treatment the day after the shootings. According to the custodian, the hospital had no records related to Tracy Y. for that time period.

Bishop also presented expert testimony from Kathy Pezdek, who is a professor of psychology at Claremont Graduate University and researches eyewitness memory and identification. Dr. Pezdek described some of the major factors that affect the accuracy of eyewitness identifications, explained that there is little correlation between a witness's confidence and accuracy, and opined that in-court identifications are unreliable. Dr. Pezdek also described the manner in which photographic lineups should be conducted to ensure accurate identifications by witnesses.

During closing arguments, Bishop's counsel acknowledged that Bishop put a cover on the Captiva while it was parked in Eagle Rock and arranged for the vehicle to be towed and repaired. Counsel suggested, however, that he did so at the

direction of another PDL gang member, Edward M. Harris's counsel argued that Tracy lied to police and that Harris's involvement in the crimes, if any, was limited to efforts to tow and repair the Captiva. Counsel for both Defendants repeatedly informed the jury that if it found Defendants became involved in the crimes only after they were committed, they could not be convicted as aiders and abettors. Counsel also argued that the police improperly targeted Defendants and failed to adequately investigate the other individuals whose DNA and fingerprints were found in the Captiva, including Christopher C., Cornell D., Shane P., Edward M., and Reuben T.

Verdict and Sentencing

The jury convicted Bishop of first degree murder (count 1) and attempted premeditated murder (count 2). It acquitted Bishop of shooting at an inhabited dwelling (counts 3 and 4) and possession of a firearm by a felon (count 6). On count 1, the jury found true the drive-by shooting special circumstance allegation (§ 190.2, subd. (a)(21)). It found not true the gang-murder special circumstance allegation (§ 190.2, subd. (a)(22)). The jury found true the firearm and gang allegations on counts 1 and 2 (§§ 186.22, subd. (b)(4), 12022.53, subds. (d) & (e)(1)).

On count 1, the court sentenced Bishop to life without parole, plus 25 years to life for the firearm enhancement. On count 2, the court imposed a consecutive life term with the possibility of parole, plus 25 years to life for the firearm enhancement. The court ordered Bishop pay various fines and fees and determined he was entitled to 1,569 days of custody credit.

The jury convicted Harris as charged. On count 1, the court sentenced him to life without parole, plus 25 years to life for the firearm enhancement. On count 2, it imposed a consecutive term of life with the possibility of parole, plus 25 years to life for the firearm enhancement. On counts 3 and 4, the court imposed consecutive life terms with the possibility of parole. On those counts, it further imposed 25 years to life terms for the firearm enhancements, which it stayed under section 654. On count 7, the court imposed the mid-term of two years, which it stayed under section 654. The court ordered Harris pay various fines and fees and awarded him 1,538 days of custody credit.

Bishop and Harris timely appealed.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Ordering the Disclosure of *Pitchess* Materials

Prior to the first trial, Defendants filed motions seeking the disclosure of certain personnel records for Pasadena Police Officers William Broghamer and Keith Gomez. Defendants subsequently agreed to allow the prosecutor to review the officers' personnel files and submit to the court any records that might be exculpatory or could be used to impeach the officers. The prosecutor then filed a motion for an order directing the City of Pasadena and the Pasadena Police Department to make available any and all exculpatory and/or impeaching documents, reports, recordings, and writings related to Officers Broghamer and Gomez.

The court held a hearing on the motions on October 6, 2014. The prosecutor and counsel for the custodian of records for the Pasadena Police Department represented that the prosecutor had reviewed the personnel files for the officers and identified certain

records that might need to be disclosed to Defendants. The court then reviewed those records during an *in camera* hearing with the custodian of records. Following its review, the court ordered disclosure of personnel records for both officers. On appeal, Defendants ask us to review the sealed record of the *in camera* hearing to determine whether the court conducted a proper *Pitchess* review or abused its discretion in withholding any discoverable information.

Typically, when a trial court finds good cause to conduct an *in camera Pitchess* hearing, the custodian of records of the relevant personnel file should bring to court all documents " 'potentially relevant' " to the defendant's motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) The trial court then reviews the documents in chambers, outside the presence of all but the custodian and such other persons the custodian agrees to have present. (*Ibid.*) In order to ensure meaningful appellate review, the trial court is obligated to make a complete record of the documents presented to it by the custodian, as well as any documents in the officer's file that were not brought to court by the custodian. (*Id.* at pp. 1227–1230.)

Here, however, Defendants consented to a different procedure. They agreed the prosecutor, rather than the custodian, would initially review the personnel files to determine what records were potentially relevant. On appeal, Defendants do not directly contend that this procedure was improper. Accordingly, we have limited our review to whether the trial court abused its discretion in determining what records to disclose. Based on our review of the sealed record of the *in camera Pitchess* hearing, we find the court did not abuse its

discretion in that regard. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209; *People v. Mooc, supra*, 26 Cal.4th at pp. 1228, 1232.)

II. The Trial Court Did Not Err in Denying Defendants' Motions for New Trial

A. There is No Substantial Likelihood of Juror Bias

Defendants contend their constitutional rights to an unbiased jury and fair trial were violated when the trial court refused to grant new trials after it was revealed that a juror failed to disclose during voir dire her employment as an administrative clerk with the Los Angeles Police Department (LAPD) in its gangs and narcotics unit. We find reversal is not required because there is no substantial likelihood the juror was actually biased.

1. Background

Prior to voir dire, the court asked the prospective jurors to complete a one-page written questionnaire. The court explained to the jurors that their responses would save time by allowing the attorneys to "hone in" on certain issues during voir dire. To that end, the court instructed the jurors to provide "complete" answers and urged them to include "as much information that's relevant to the questions as possible."

In response to the questionnaire's prompt to "describe your job," Juror No. 5 wrote: "I am an Administrative Clerk for the City of Los Angeles. My job consists of filing and data entry." During voir dire, the attorneys did not ask the juror any follow-up questions about this answer. In response to other questions during voir dire, Juror No. 5 indicated she could be fair and would presume Bishop was innocent despite his gang ties. She also stated she would vote not guilty if the prosecution proved Bishop was a member of the gang that committed the

crimes, but there was a reasonable doubt as to whether he was a perpetrator. Juror No. 5 did not respond when Harris's counsel asked if any of the jurors had a background with Pasadena gangs or "thinks that proof that a person is a member of a gang is sufficient to convict them of murder." Nor did she respond when counsel asked if any juror disbelieved that "a person that's in a gang could be arrested, accused of a crime and go to trial and be proven not guilty."

After the jury returned its verdicts, Defendants filed motions for new trials, in part based on alleged misconduct by Juror No. 5. In particular, Defendants asserted that Juror No. 5 deliberately and willfully concealed on the written juror questionnaire and during voir dire that she worked for LAPD in its gangs and narcotics unit.

Defendants supported their motions with declarations from Juror Nos. 5 and 7.[8] Juror No. 5 recounted in her declaration that "[b]efore voir dire, I was asked to fill out a questionnaire which I knew would be used by the court and the lawyers to

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[8] Bishop also submitted a declaration from his trial counsel recounting a conversation with Juror No. 8. At the hearing on the motion for new trial, defense counsel informed the court she was unable to obtain a signed declaration from Juror No. 8, but would submit one to the court before the date set for motions and sentencing. The record on appeal, however, does not contain a signed declaration by Juror No. 8. Counsel's declaration is inadmissible hearsay, and we decline to consider it. (See *People v. Williams* (1988) 45 Cal.3d 1268, 1318 [declaration of defense investigator relating conversation with a juror not admissible to impeach the verdict] abrogated on another ground by *People v. Diaz* (2015) 60 Cal.4th 1176.)

evaluate my ability to be a fair and impartial juror. [¶] When answering question #2 asking me to describe my job, ... I purposefully left out that I, in fact, worked for the Los Angeles Police Department gangs and narcotics unit as an administrative clerk. I omitted as well that I had been a dispatcher for LAPD before being a clerk. I understood the question and willfully chose to conceal my employment with the Los Angeles Police Department." Juror No. 5 explained that she did not include the information because she "had been on several jury panels before but had never been chosen. Saying I work for LAPD sounds awful and I always wanted to be on jury duty so I did not say it in voir dire."

Juror No. 5 further recounted that "after having discussed [during deliberations] the testimony of Darcy B[.], I was walking to the court from the juror parking lot. Because Darcy B[.] had said she could describe the driver of the car she saw speed by her that morning, I attempted to observe drivers that were driving by me. I was unable to do so even at city street speeds. I told the other jurors of this experiment and I attempted to get them to try it for themselves. I bet them $10 that they could not describe the drivers of cars that drove past them as they were on the sidewalk. The next day several of the jurors reported that they attempted to see drivers who were driving by them as they walked to the courthouse. Most were unable. One juror noted he saw a young Asian woman with bangs. I did not pay out the $10 to any juror."

Juror No. 5 further explained that she "did not believe Mr. Bishop was in the car but he would have known what was happening with the vehicle by virtue of being in the gang and how word gets around."

Juror No. 7 recounted in his declaration that Juror No. 5 "told us she worked for the Los Angeles Police Department in the gang and narcotics unit." He did not specify when or to whom Juror No. 5 disclosed this information. In addition, Juror No. 7 recalled Juror No. 5 saying "all gang members do is kill, rob and steal," and "the defendants were gang members and if they don't go down for this, they will go down for something else." Juror No. 5 admitted making the latter statement, but denied saying "all gang members do is kill, rob and steal."

At the hearing on the motions, Bishop argued that Juror No. 5 "willfully lie[d]" in order to get seated on the jury, and then proceeded to act as an "agent" for the LAPD and the prosecution in the jury room. Harris similarly argued that Juror No. 5 "intentionally lied her way into [the] jury," and convicted Defendants simply because they are gang members.

The court denied the motions. Initially, it found there was no misconduct since Juror No. 5's questionnaire response was not "false on its face." The court further determined that, even if Juror No. 5 committed misconduct, she was not concealing any bias and there was no resulting prejudice. The court noted that the juror said she declined to reveal her connection to LAPD simply because she wanted to serve on a jury, and not because she was concealing a bias. Juror No. 5 also indicated she could be fair, and she was critical of the prosecution's witness during deliberations. Further, the juror's comments were consistent with the evidence, and there was no indication that she disclosed to other jurors extraneous information or conveyed she had independent knowledge of the workings of gangs.

2. Legal Principles

A person accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*).) "An impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial." (*Nesler, supra*, 16 Cal.4th at p. 581, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217.)

"The impartiality of prospective jurors is explored at the preliminary proceeding known as voir dire. 'Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule . . . .' [Citation.]" (*In re Hitchings* (1993) 6 Cal.4th 97, 110, italics omitted.)

The attorneys have a duty on voir dire to ask "direct and specific questions," and " 'pin down' " a potential juror when her answers are unclear. (*Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 741–742.) Jurors, in turn, "are required to be cooperative, and should volunteer information about any matter which could be construed as rendering them biased." (*Ibid.*) Because the " 'prosecution, the defense and the trial court rely on the voir dire responses in making their respective decisions, . . . if potential jurors do not respond candidly the jury selection process is rendered meaningless. Falsehood, or deliberate concealment or nondisclosure of facts and attitudes deprives both sides of the

right to select an unbiased jury and erodes the basic integrity of the jury trial process.' [Citation.]" (*In re Hitchings, supra,* 6 Cal.4th at pp. 110–112.) Thus, a "juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct." (*Id.* at p. 111.)

Once the defendant establishes a juror has engaged in misconduct, a rebuttable presumption of prejudice arises. (*In re Carpenter* (1995) 9 Cal.4th 634, 657; *People v. Majors* (1998) 18 Cal.4th 385, 417.) The presumption may be rebutted by an affirmative showing of no actual bias, or a determination by the reviewing court, after considering all pertinent portions of the record, that there is no substantial likelihood of actual harm to the defendant from the misconduct. (*People v. Brooks* (2017) 3 Cal.5th 1, 93.) "That is, the 'presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant.' [Citation.] In other words, the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias." (*In re Boyette* (2013) 56 Cal.4th 866, 889–890, italics omitted.)

"If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural

trial defects that compel reversal without application of a harmless error standard." (*Nesler, supra*, 16 Cal.4th at p. 579.)

"[W]hen a criminal defendant appeals the denial of his or her motion for a new trial on grounds of juror misconduct, the appellate court must independently review, as a mixed question of law and fact, the trial court's conclusion that no prejudice arose from the misconduct." (*People v. Ault* (2004) 33 Cal.4th 1250, 1255, italics omitted, citing *Nesler, supra,* 16 Cal.4th at p. 582, fn. 5.) Nonetheless, we give deference to the trial court's factual findings and credibility determinations if supported by substantial evidence. (*People v. Danks* (2004) 32 Cal.4th 269, 303, 304.)

3. Analysis

Defendants insist that Juror No. 5 engaged in misconduct by "deliberately conceal[ing]" that she worked for the LAPD in its gangs and narcotics unit. There is no evidence, however, that Juror No. 5 provided false or incomplete answers to any questions asked of her in connection with the juror questionnaire or during voir dire. When prompted by the questionnaire to describe her job, Juror No. 5 responded truthfully and accurately that she performs filing and data entry as an administrative clerk for the City of Los Angeles.[9] In fact, by identifying the name of her employer, Juror No. 5 actually provided more information than requested; the questionnaire asked the prospective jurors to "describe [their] job[s]," but did not specifically ask them to disclose their employers. Juror No. 5 was not asked any other questions during voir dire that would have

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[9] The LAPD is a department of the City of Los Angeles.

called for her to disclose additional information about her employer.[10]

Defendants suggest that, even if her response to the questionnaire was truthful, Juror No. 5 nevertheless should have disclosed that she was specifically employed by the LAPD in its gangs and narcotics unit. The purpose of the questionnaire, however, was to serve as a jumping-off point for voir dire, and it was incumbent upon the attorneys to resolve any uncertainty in Juror No. 5's responses by asking follow-up questions. Given the City of Los Angeles's size, and the breadth of services it provides, a natural follow-up question to the juror would have been, "for which department within the city do you work?" The attorneys overlooked this obvious issue and chose to focus their inquiry elsewhere. We are hesitant to find that a juror who

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[10] We find no merit to Harris's contention that Juror No. 5 was required to reveal her employment with LAPD after another juror was questioned regarding a connection to law enforcement. The other juror was specifically asked about an immediate family member who was a police officer. The question, therefore, did not trigger a duty in Juror No. 5 to reveal any additional information about her professional, as opposed to personal, connections to law enforcement.

Similarly, there is no merit to Harris's assertion that Juror No. 5 should have responded affirmatively when defense counsel asked if any juror "has any background or not about Pasadena gangs." The question was directed specifically at *Pasadena* gangs, and there is nothing in the record to suggest Juror No. 5 had any such knowledge or background through her work for the *Los Angeles* Police Department. In fact, the record does not disclose that Juror No. 5 possessed knowledge or background related to any gang.

provided a truthful, albeit somewhat vague, answer on voir dire engaged in misconduct when any uncertainty in the juror's response could have been clarified through routine follow-up questioning. (Cf. *Cabe v. Superior Court, supra*, 63 Cal.App.4th at p. 742 [juror did not commit perjury where there were no follow-up questions to the juror's true, but partial, answer to a compound question].)

Still, Juror No. 5's failure to provide a more comprehensive depiction of her employment was not due to a misunderstanding, lapse in memory, or some other innocent mistake. The juror clearly understood, while completing the questionnaire, that the parties would want to know that she specifically worked for the LAPD in its gangs and narcotics unit. Indeed, Juror No. 5 explained in her declaration that she suspected she would be dismissed from the jury panel if she revealed such information. Despite this, Juror No. 5 chose to disclose only that her employer was the City of Los Angeles. While her answer may have been truthful, it was purposefully crafted in such a way as to discourage the parties from discovering information the juror knew they would consider to be highly relevant.

Thus, this case poses the question of whether a juror who provides truthful answers on voir dire nonetheless commits misconduct by not volunteering additional information that she knows the parties would find relevant, but was never specifically requested. We leave the resolution of that issue for another day, however, because we find that even if we were to conclude Juror No. 5 engaged in misconduct, there was no resulting prejudice.

Assuming for the sake of argument that Juror No. 5's nondisclosure constitutes misconduct, the fact that she acted intentionally is strong proof of bias. (*In re Manriquez* (2018)

5 Cal.5th 785, 798.) However, "[w]hether any nondisclosure was intentional is not dispositive; an unintentional nondisclosure may mask actual bias, while an intentional nondisclosure may be for reasons unrelated to bias. The ultimate question remains whether [the defendant] was tried by a jury where a substantial likelihood exists that a juror was actually biased against [the defendant]." (*Ibid.*)

After reviewing the entire record, including the nature of the purported misconduct and the surrounding circumstances, we find any presumption of prejudice is rebutted and there is no substantial likelihood that Juror No. 5 was biased against Defendants. Juror No. 5 provided an innocent explanation for her decision not to reveal additional details about her employer: she had a general desire to serve on a jury and thought disclosing such information would lead to her dismissal. There is nothing in the record to suggest the juror was motivated by a desire to sit on this particular jury or by her knowledge that this case involved gang allegations. Nor, for that matter, is there evidence that, by virtue of her employment, Juror No. 5 was impermissibly deferential to law enforcement, felt particular animosity towards gang members, or possessed outside knowledge that was likely to influence her decisions in this case. We must also defer to the trial court's finding that Juror No. 5 was credible when she declared, during voir dire, that she could be fair to Defendants. (*People v. Danks, supra,* 32 Cal.4th at p. 304.)

Moreover, the fact that Juror No. 5 openly questioned the credibility of one of the prosecution's key witnesses— Darcy B.— provides strong evidence that she harbored no bias against Defendants. The prosecution's case against Bishop consisted primarily of evidence tying him to the Captiva. There was

considerable evidence, however, suggesting he was not driving the Captiva at the time of the shootings. Bishop was seen driving a different vehicle just three days earlier, police found another PDL gang member's DNA on the Captiva's gear shift, and an eyewitness's description of the driver did not match Bishop. Given this evidence, Darcy B. was crucial to the prosecution's case, as she claimed to have seen Bishop driving a Captiva near the Newport/Wyoming intersection just minutes before the shootings. If the jury believed her testimony, there was little doubt Bishop was guilty of the crimes, either as a direct perpetrator or an aider and abettor. Despite her centrality to the prosecution's case, Juror No. 5 was highly critical of Darcy's testimony and openly questioned her credibility in front of the other jurors. In fact, in an attempt to convince jurors that Darcy's identification of Bishop was unreliable, Juror No. 5 arguably ignored one of the court's instructions and encouraged other jurors to do the same. We can conceive no reason why Juror No. 5 would behave in this manner if she truly was biased against Defendants in the manner they suggest. Juror No. 5's conduct is compelling evidence that she had not prejudged the case, was receptive to Defendants' arguments, and was willing to weigh the evidence in a neutral manner. It is sufficient to overcome any presumption of prejudice and establish there is no substantial likelihood of bias.

Defendants entirely ignore this evidence. Instead, they insist Juror No. 5's bias is undeniable given she revealed her employment to other jurors "during deliberations," in a "clear move to garner support and credibility from the jurors who were in favor of acquittal." These assertions, however, are premised on nothing more than speculation. Although it is undisputed that

Juror No. 5 told other jurors she worked for LAPD, the juror declarations do not specify when she made the disclosure, to whom she was speaking, or why she revealed the information. Indeed, even Defendants cannot seem to agree on the timing of the disclosure: Harris contends Juror No. 5 disclosed her employment "immediately" during deliberations, whereas Bishops insists she did so only "when she needed to exert her influence . . . with the holdout jurors." Neither defendant acknowledges the distinct possibility, wholly consistent with the record, that Juror No. 5 did not make the disclosure during deliberations in an attempt to garner support from other jurors, but instead revealed her employment in the course of a casual conversation during one of the frequent breaks in the 45-day trial.

We find the absence of contextual detail on this issue to be quite telling. The juror declarations were clearly drafted by defense counsel, and we are confident that, if the context of the disclosure was at all helpful to Defendants, such information would have been included. Given the complete lack of evidence showing the context in which the disclosure was made, we refuse to ascribe to Juror No. 5 any improper motive.

Harris next contends that Juror No. 5's bias is evident from her comment that "if [Defendants] don't go down for this, they'll go down for something else." He insists the comment reflected knowledge about gangs Juror No. 5 gained through her employment with LAPD, and therefore "interjected extraneous evidence into the deliberations." We disagree. There is absolutely no indication that the statement was based on Juror No. 5's outside knowledge, nor do we think other jurors were likely to interpret it in that way. Rather, the statement reflected

a reasonable inference suggested by the evidence at trial. There was overwhelming evidence that Bishop and Harris were active members of PDL, which was repeatedly described at trial as a "criminal street gang." Further, the prosecution's gang expert testified that PDL is a "very violent gang," its primary activities run "the full spectrum of crime," and its members commit crimes to build their reputation and influence within the gang. We suspect most reasonable jurors would infer from this evidence that, so long as Defendants remain members of the gang, they are likely to engage in criminal conduct.[11]

Harris seems to suggest the comment nonetheless evidences bias because it was intended to convince the other jurors to convict Defendants simply because they are gang members who will inevitably commit other crimes. Although we acknowledge that is a reasonable interpretation of the comment, absent evidence of the context in which it was made, we are not convinced it is the correct one. In every case involving gang evidence, there is a risk the jury will convict the defendant simply because he is involved in a criminal lifestyle, and not because it is convinced beyond a reasonable doubt that he committed the charged crime. That risk was particularly great in this case given the Defendants all but admitted they committed other serious gang-related crimes—being accessories after the fact to murder—for which they were not charged. Although Juror No. 5's comment may have been a reflection of this sentiment, it also could have been an attempt to turn that notion on its head. We think it reasonable to interpret the comment as expressing to

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[11] For the same reasons, we reject Harris's contention that the comment itself constituted an act of misconduct by Juror No. 5.

the other jurors that they need not feel compelled to convict Defendants for crimes they may not have committed, because Defendants will inevitably be convicted and incarcerated for crimes they did commit. If this is indeed what Juror No. 5 intended to convey, her comment would provide strong evidence that she did not harbor an undisclosed bias against Defendants. Unfortunately, it is impossible for us to definitively interpret the remark given the complete absence of evidence showing the context in which it was made.

The same is true of Juror No. 5's statement, "all gang members do is kill, rob and steal." We note at the outset there was conflicting evidence as to whether Juror No. 5 actually made this comment. Nonetheless, even assuming Juror No. 5 did so, it is of little value given the record is, yet again, entirely devoid of evidence showing the context in which the comment was made. Without such context, we cannot meaningfully determine what Juror No. 5 intended to convey, or analyze how the comment reflects on her potential bias.

Bishop further suggests that Juror No. 5 demonstrated her bias when she indicated her decision to convict Bishop was informed by a belief that "gang members would have known that the shooting would have taken place." Setting aside the potential evidentiary problems with considering this statement (see Evid. Code, § 1150), we fail to see how it evidences Juror No. 5's bias. Such a belief would have been entirely consistent with the substantial evidence presented at trial that multiple PDL gang members, including Bishop and Harris, were communicating with one another by phone around the time of the initial chase and subsequent shootings.

Finally, we reject Bishop's contention that we must reverse the convictions because defense counsel "would have challenged [Juror No. 5's] ability to remain on the jury panel" had she fully disclosed the nature of her employment. When considering juror misconduct during voir dire, the test is "not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias." (*In re Boyette, supra*, 56 Cal.4th at p. 890.) For the reasons discussed above, we find no substantial likelihood of bias in this case.

B. The Jurors Did Not Commit Prejudicial Misconduct by Discussing Defendants' Failure to Testify

Defendants next contend the jurors committed prejudicial misconduct by improperly discussing during deliberations their failure to testify at trial. Although we agree the jurors engaged in misconduct, we find no substantial likelihood that Defendants suffered any harm.

Before deliberations, the trial court instructed the jurors that Defendants had a constitutional right not to testify, and they should not discuss Defendants' failure to testify or let that fact influence their decision in any way. Nonetheless, Juror No. 7 recounted in his declaration that the "jurors did discuss the defendants' decision not to testify and someone mentioned something about how they would have preferred to hear they were committing a crime somewhere else than hear nothing at all from them." Juror No. 5 similarly recounted in her declaration that a "few jurors said they would have rather heard the defendants testify that they were robbing an old lady; that would have been better than not testifying at all."

Defendants moved for new trials on the basis that the jurors' discussion of this topic constituted misconduct. The court denied the motions, explaining there was no evidence that the jurors actually used Defendants' failure to testify against them. Rather, it appeared the jurors were simply expressing frustration that Defendants failed to present any evidence showing what they were doing at the time of the crimes that might combat the prosecution's evidence showing their guilt beyond a reasonable doubt.

"The Fifth Amendment to the federal Constitution provides that no person 'shall be compelled in any criminal case to be a witness against himself.' . . . The right not to testify would be vitiated if the jury could draw adverse inferences from a defendant's failure to testify. Thus, the Fifth Amendment entitles a criminal defendant, upon request, to an instruction that will 'minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.' " (*People v. Leonard* (2007) 40 Cal.4th 1370, 1424–1425.) A juror's violation of a court order not to discuss a defendant's failure to testify constitutes misconduct giving rise to a presumption of prejudice. (*Id.* at p. 1425.) That presumption may be rebutted by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the defendant suffered actual harm. (*Ibid.*)

In *People v. Leonard, supra*, 40 Cal.4th 1370, the defendant was convicted of six counts of murder and the jury returned a verdict of death. Before the penalty-phase deliberations, the court instructed the jurors not to discuss the defendant's failure to testify. Nonetheless, several jurors expressed the opinion that they would have liked to have heard from the defendant so they

could better understand why he killed six people, whether he was truly remorseful, and the extent of his impairment. (*Id*. at p. 1424.) The California Supreme Court concluded the jurors engaged in misconduct, but there was no substantial likelihood that the defendant was prejudiced by the jury's brief discussion of his failure to testify. The high court explained that the jurors' comments "merely expressed regret that defendant had not testified, because such testimony might have assisted the jurors in understanding him better. . . . '[M]erely referencing that they wish he would have testified is not the same as punishing the Defendant for not testifying.' " (*Id*. at p. 1425.)

Here, too, the jurors committed misconduct by violating the court's order not to discuss Defendants' failure to testify. Nonetheless, after reviewing the entire record, we conclude there is no substantial likelihood that Defendants suffered actual harm. The jury's "discussion" of the issue appears to have been very brief, consisting of a few isolated comments made in passing. We also agree with the trial court's assessment that the jurors were simply expressing frustration at the lack of evidence of an alibi that might have rebutted the substantial evidence showing Defendants' guilt. The jurors' frustration in this regard was understandable. Harris told police he was in Fontana at the time of the shootings, but his cell phone records indicated he was actually in Pasadena and near the scene of the crimes. Harris's counsel acknowledged this discrepancy, but offered no alternative alibi. Bishop's counsel similarly failed to offer any evidence or argument explaining what he was doing at the relevant times, despite considerable evidence placing him at the scene of the shootings. The jurors' comments reflect frustration with counsels' complete failure to address such a crucial period and

rebut the significant evidence showing Defendants were involved in the shootings. Although the jurors should have expressed their frustration in a different way, the offhand comments do not indicate they in any way punished Defendants for not testifying. On this record, we find no substantial likelihood of harm. (See *People v. Hord* (1993) 15 Cal.App.4th 711, 727–728 ["Transitory comments of wonderment and curiosity, although misconduct, are normally innocuous, particularly when a comment stands alone without any further discussion."].)

C. The Court Did Not Abuse Its Discretion in Refusing to Hold an Evidentiary Hearing

Harris briefly contends the trial court abused its discretion by failing to conduct an evidentiary hearing on the issue of juror misconduct. We disagree.

The trial court may conduct an evidentiary hearing to determine the truth of an allegation of juror misconduct. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415–416; *People v. Hayes* (1999) 21 Cal.4th 1211, 1255.) Such a hearing is appropriate when a defendant has presented the court with evidence demonstrating a strong possibility that prejudicial misconduct took place. Though the defendant is not entitled to a hearing as a matter of right, one should be held when needed to resolve material, disputed issues of fact associated with a claim of juror misconduct. Denial of an evidentiary hearing is reviewed for abuse of discretion. (*People v. Hedgecock, supra*, 51 Cal.3d at pp. 415–416; *People v. Hayes, supra*, 21 Cal.4th at p. 1255; *People v. Lavender* (2014) 60 Cal.4th 679, 693.)

Initially, Harris forfeited this claim by failing below to request an evidentiary hearing.[12] (See *People v. Hinton* (2006) 37 Cal.4th 839, 898.) Even if we were to overlook the forfeiture, we would conclude the court did not abuse its discretion. Harris fails to adequately explain why an evidentiary hearing was necessary. The material facts were undisputed, with a single exception: whether Juror No. 5 said "all gang members do is kill, rob and steal." Although the trial court did not explicitly resolve that conflict, it determined the comment did not show bias. As a result, there were no material, disputed issues of facts to resolve at an evidentiary hearing.

III. The Court Did Not Err in Excluding Certain Third-Party Culpability Evidence

Harris contends the trial court violated his state and federal constitutional rights by improperly excluding third-party culpability evidence.[13] We disagree.

A. Background

Before trial, Bishop filed a motion in limine[14] seeking admission of third-party culpability evidence that purportedly linked numerous PDL gang members, including Christopher C. and Cornell D., to the shootings. Christopher and Cornell were arrested in connection with the shootings but not charged with any crimes.

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[12] Bishop requested an evidentiary hearing in connection with his motion for new trial, but Harris did not join in that request.

[13] Bishop joins this argument.

[14] Harris subsequently joined the motion.

Bishop sought to introduce, among other things, a recording of a phone call Cornell made from jail after he was arrested. During the call, Cornell's friend says, "I will be waiting for you bro, I'm not going to make no moves until you get out, but I'm about to leave your house you feel me?" Cornell responds, "yeah," and the friend says, "Because I know they coming over here just because of the simple fact, they gonna [be] looking for that strap." The word "strap" is slang for gun.

With respect to Christopher C., Bishop sought to introduce evidence that he falsely told police he had never been in the Captiva. Bishop also sought to introduce evidence that Christopher told police he was at his grandparents' house at the time of the shootings, which counsel characterized as a "weak alibi."[15]

The prosecutor argued the evidence should be excluded because it was too speculative. The court denied the motion, noting "much of [the evidence] is hearsay."

During trial, the jury heard evidence that Cornell's fingerprints were found on the Captiva. It also heard evidence that Christopher had been seen riding as a passenger in the Captiva about a month before the shootings, and his DNA was present on a toothpick discovered in the vehicle's driver's seat.

Bishop's counsel subsequently asked the court to reconsider its ruling and allow her to play the recording of Cornell's jail phone call. Counsel also informed the court that she intended to ask Detective Keith Gomez, who was the lead investigator on the case, whether he had listened to the recording. The court again

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[15] Counsel characterized the alibi as "weak" apparently because Christopher's grandparents could not recall precisely what time he was at their house that day.

denied counsel's request to play the recording and ruled she could not ask Detective Gomez about the call.

While cross-examining Detective Gomez, Bishop's counsel asked whether Christopher. ever denied being in the Captiva. The prosecutor objected on hearsay grounds, and the trial court sustained the objection.

B. Analysis

"[T]he standard for admitting evidence of third party culpability [is] the same as for other exculpatory evidence: the evidence [has] to be relevant under Evidence Code section 350, and its probative value [can]not be 'substantially outweighed by the risk of undue delay, prejudice, or confusion' under Evidence Code section 352." (*People v. Kaurish* (1990) 52 Cal.3d 648, 685.) " 'To be admissible, the third-party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.' [Citation.] However, 'evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 140–141.) We review for an abuse of discretion a trial court's exclusion of third-party culpability evidence. (*People v. Brady* (2010) 50 Cal.4th 547, 558.)

Here, the court did not abuse its discretion in excluding third-party culpability evidence related to Cornell. and Christopher. Regarding the jail phone call, Harris insists the evidence was highly probative of Cornell's guilt because it captured him instructing a friend to dispose of a gun that may

have been used in the shootings. Cornell, however, did no such thing. Rather, it was the *friend* who indicated that the *police* likely believed there was a gun at Cornell's house.[16] We fail to see how this statement shows Cornell conspiring to destroy evidence or otherwise implicates him in the shootings. Moreover, to the extent Harris intended to offer the statement because it somehow implied there was a firearm at Cornell's house, the statement was inadmissible hearsay. (See *People v. Garcia* (2008) 168 Cal.App.4th 261, 289.)

About Christopher's statements to police, we agree with Harris that the evidence was not hearsay. The statements were offered to show that Christopher lied, not for the truth of the matters asserted. Nonetheless, the evidence was properly excluded under Evidence Code section 352.[17] (See *People v. Zapien* (1993) 4 Cal.4th 929, 976 [a reviewing court must affirm trial court evidentiary rulings if correct on any theory of law applicable to the case].) The fact that Christopher lied about being in the Captiva or gave a false alibi may have shown some consciousness of guilt. Nonetheless, Christopher was known to be a PDL gang member, and the jury heard extensive testimony

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16 Harris's confusion appears to stem from the fact that Bishop's trial counsel misrepresented the content of the call at the hearing.

17 Evidence Code section 352 affords the court discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352.)

that gang members often refuse to cooperate with police.[18] That Christopher may have lied to police, therefore, is not particularly probative of whether he was involved in the shootings, even in light of the other evidence tying him to the Captiva. Moreover, given the significant evidence that more than two people were in the Captiva during the shootings, the fact that Christopher may have been involved in the crimes says little about whether Defendants were also involved. On the other hand, had the court admitted the evidence, there was a significant risk of undue delay and confusion, as it would have opened the door to a mini-trial on where Christopher was and what he was doing at the time of the shootings. Accordingly, the third-party culpability evidence was properly excluded under Evidence Code section 352.

Harris insists the evidence alternatively should have been admitted to impeach the prosecution's police witnesses. Specifically, he contends the evidence showed the investigators improperly focused on Defendants while ignoring other suspects, rendering the investigation "fatally flawed." We disagree. Because the evidence was not particularly probative of Cornell's or Christopher's culpability, even considering the other evidence tying them to the Captiva, its probative value in impeaching the officers and attacking the investigation was also minimal. Indeed, the police cannot be faulted for failing to further investigate a suspect based on speculative evidence. The court did not abuse its discretion in excluding the evidence to the extent it was offered for this purpose.

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[18] Harris's counsel, for example, acknowledged in closing that Harris frequently lied to police about his membership in PDL.

We also find no merit to Harris's contention that exclusion of the evidence prevented him from having a meaningful opportunity to present a complete defense. Although "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense, . . . the proffered evidence must have more than slight relevancy to the issues presented." (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.) As discussed above, evidence of Cornell's phone call and Christopher's statements to police did not have significant probative value. Consequently, the trial court's exclusion of such evidence did not result in a constitutional violation.

IV. The Court Did Not Abuse Its Discretion In Admitting a Recording of a Jail Phone Call Between Bishop and His Cousin

Defendants contend the trial court violated their state and federal rights to due process and a fair trial when it allowed the prosecutor to play for the jury a recording of a phone call Bishop made from jail to his cousin. Bishop argues the recording should have been excluded under Evidence Code section 352 because Bishop's comments during the call were ambiguous. Harris separately argues the court erred in refusing Defendants' request to play a recording of a prior phone call between Bishop and his mother, which he contends would have provided context for Bishop's conversation with his cousin. We find no error.

A. Background

At trial, the prosecutor sought to play for the jury a recording of a jail phone call Bishop made to his cousin, Christopher C. The call included the following exchange:

"[Christopher]: Yeah . . . your mom say how your case is looking?

"[Bishop]: Uh . . . it's . . . it's looking good . . . we filing some motions and shit that . . . that should be coming through but shit . . . Like I say shit true.

"[Christopher]: Hell yeah.

"[Bishop]: You heard me? Shit true.

"[Christopher]: Yeah . . . yeah I know.

"[Bishop]: Yeah . . . so that . . . that . . . that's hurting me a little bit but shit, I don't know . . . I'm trying to figure out how I'm gonna get bypass that part.

"[Christopher]: Yeah yeah . . . I mean talkin' and shit . . . you'll be alright . . . [unintelligible]

"[Bishop]: Huh?

"[Christopher]: You'll be alright.

"[Bishop]: Hell yeah . . . I go back to court on the fifteenth so we gonna. . . know what I mean . . . so hopefully I don't know we supposed to . . . I don't know man this shit . . . shit's stupid man."

The prosecutor argued the recording was relevant and admissible because Bishop's statement, "shit true," constituted an admission. Defendants responded that the phrase was ambiguous, and to put it in proper context, Evidence Code section 356 required admission of a prior phone call between Bishop and his mother. The call between Bishop and his mother took place nine days before the call with Christopher, and included the following exchange:

"[Bishop]: I just heard some bad news so it look like I might be here for at least a year on this.

"[Mother]: You heard some bad news?

"[Bishop]: Yeah. We don't know if it's true yet. We looking into it to see if it's true.

"[Mother]: Oh, okay."

Defendants insisted the two conversations were on the same subject—the status of Bishop's criminal case—and Bishop's remark, "shit true," referred to his earlier comment to his mother that he did know whether certain bad news was "true." Alternatively, they argued the call with Christopher should be excluded as unduly prejudicial under Evidence Code section 352. The court denied Defendants' request to play the recording of the phone call between Bishop and his mother. It did not make a ruling on the Evidence Code section 352 objection.

The prosecutor played the recording of Bishop's call with Christopher during her direct examination of Detective Gomez. Immediately before doing so, Gomez explained that he believed the recording included an admission that Bishop was involved in a murder. After the jury heard the recording, the prosecutor asked Gomez to explain what portion he believed to be an admission. Bishop objected that the question called for Gomez to enter into the jury's province. The court overruled the objection, and Gomez explained that he interpreted Bishop's "shit true" statement as "telling his friend that the allegations are true." Gomez proceeded to explain that "as you gather evidence and you build a case hearing statements like that solidify suspicions on a suspect when it comes out of their own mouth that they're admitting to doing something."

B. Analysis

1. The Court Did Not Abuse Its Discretion Under Evidence Code Section 352

Bishop contends the court should have excluded under Evidence Code section 352 the recording of the call with Christopher because Bishop's comment, "shit true," was too ambiguous. We disagree.

Evidence Code section 352 affords the court discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352.) Rulings under Evidence Code section 352 are reviewed for an abuse of discretion. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.) Under that standard, the trial court's ruling will not be disturbed unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Ibid.*)

Initially, Bishop forfeited this claim by failing to press the trial court to specifically rule on the Evidence Code section 352 objection. (See *People v. Lewis* (2008) 43 Cal.4th 415, 481 ["Failure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance."], disapproved of on other grounds by *People v. Black* (2014) 58 Cal.4th 912, 919.) Even if we were to overlook the forfeiture, we would find the court did not abuse its discretion. Bishop made the "shit true" comment shortly after Christopher asked how his "case is going." Bishop initially responded that things were going well, but quickly revealed he

was "hurting . . . a little bit" because "shit true." Considered in context, the jury could have reasonably interpreted Bishop's comment as an admission that the charges against him were true. If interpreted in that manner, the evidence was highly probative of his guilt. On the other hand, any risk of undue prejudice, consumption of time, or confusion was minimal. Accordingly, Evidence Code section 352 did not mandate the exclusion of the recording.

We also find no merit to Bishop's perfunctory argument that it was "highly prejudicial under the circumstances" to allow Detective Gomez to testify that he interpreted Bishop's comments as an admission. Initially, Bishop has forfeited this claim by failing to provide any meaningful analysis or authority to support it. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9 [declining to consider claim "perfunctorily assert[ed] . . . without argument in support"].) In any event, we find his contention meritless. Throughout trial, defense counsel sought to establish that the police, and particularly Detective Gomez, improperly targeted Bishop while ignoring numerous other suspects. To combat that defense, the prosecutor frequently elicited testimony from Detective Gomez explaining why he focused the investigation on Bishop. It was in this context, and for that purpose, that the prosecutor asked Detective Gomez to explain how he interpreted Bishop's "shit true" comment. Under these circumstances, the testimony was proper.

2. The Court Did Not Abuse Its Discretion Under Evidence Code Section 356

Harris contends the court violated his constitutional rights when it denied Defendants' request under Evidence Code section

356 to play the recording of Bishop's call with his mother.[19] He insists the call provided context for Bishop's subsequent conversation with Christopher, and suggested Bishop's remark, "shit true," was simply an "acknowledgment he was not getting out of jail anytime soon and had a long fight ahead of him." We disagree.

"Evidence Code section 356 provides, in relevant part, that '[w]here part of [a] . . . conversation . . . is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . when a . . . conversation . . . is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.' 'The purpose of Evidence Code section 356 is to avoid creating a misleading impression. [Citation.] It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced. [Citation.] Statements pertaining to other matters may be excluded.' [Citations.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1324.) We review the trial court's ruling under Evidence Code section 356 for an abuse of discretion. (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274.)

The trial court did not abuse its discretion in excluding the call between Bishop and his mother. Any connection between that call and the call with Christopher was far too speculative. To connect the conversations, the jury would have to believe that Bishop expected his mother, upon hearing a summary of the call with Christopher, would understand his remark "shit true" to

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19 Bishop joins this argument.

specifically refer to the "bad news" he mentioned in passing during their conversation nine days earlier. If Bishop had intended to provide his mother an update on the "bad news" referenced in the first conversation, we suspect he would have done so in a less cryptic manner. Moreover, the fact that Bishop prefaced one of the "shit true" comments with "You heard me?" suggests it was directed at Christopher, and not his mother.

The call the prosecution proffered was independent of the call Bishop sought to introduce, and each could be understood without reference to the other. "A court does not abuse its discretion when under Evidence Code section 356 it refuses to admit statements from a conversation or interrogation to explain statements made in a . . . distinct and separate conversation." (*People v. Johnson* (2010) 183 Cal.App.4th 253, 287–288.) Accordingly, Evidence Code section 356 did not provide a basis for admission of the excluded recorded conversation with Bishop's mother.[20] (*People v. Chism, supra*, 58 Cal.4th at pp. 1324–1325.)

V. The Court Did Not Erroneously Limit Bishop's Expert's Testimony

Bishop contends the trial court deprived him of his constitutional rights to due process and to present a defense when it limited the testimony of his expert, Dr. Pezdek. Specifically, he argues the court improperly precluded Dr. Pezdek

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[20] For the same reasons, the court's exclusion of the recording did not violate Defendants' constitutional rights to present a complete defense. (See *People v. Hall* (1986) 41 Cal.3d 826, 834 ["As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense."].)

from testifying to the content of studies, tests, and reports prepared by non-testifying experts. We find no merit to this claim.

A. Background

Before Bishop presented his defense, the court granted the prosecutor's motion to preclude Dr. Pezdek from, among other things, "recounting on direct examination the content of any studies relied on by her in formulating her opinion," including the "contents of any studies, textbooks, or reports relied on by [her] in formulating her opinions" or "contents, recommendations, or reports of any governmental agencies." The court clarified that Dr. Pezdek could testify that she relied on certain studies. She could not, however, discuss the content of those studies, which would be inadmissible hearsay.

During direct examination by Bishop's counsel, the prosecutor objected when Dr. Pezdek began to testify to research done by "some colleagues and I." The court instructed Dr. Pezdek that she could testify to her own studies, but not studies and reports prepared by someone else. Subsequently, Dr. Pezdek explained the procedures she uses when conducting photographic lineups in her research. Bishop's counsel asked Dr. Pezdek how she developed these procedures, and Dr. Pezdek began discussing research studies conducted by Gary Wells. The prosecutor objected, and the court admonished Dr. Pezdek that she could talk generally about the studies, but could not discuss the results or statistics from those studies.

B. Analysis

An expert may generally base her opinion on any matter known to her, including hearsay of a type reasonably relied on by professionals in her field. (*People v. Catlin* (2001) 26 Cal.4th 81,

137 (*Catlin*).) On direct examination, the expert may give the reasons for an opinion, including the materials she considered in forming the opinion, but may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence. (*People v. Price* (1991) 1 Cal.4th 324, 416; *Catlin, supra,* 26 Cal.4th at p. 81, 137; *People v. Nicolaus* (1991) 54 Cal.3d 551, 583.) Consequently, "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts." (*People v. Campos* (1995) 32 Cal.App.4th 304, 308.) "A trial court has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay." (*People v. Price, supra,* 1 Cal.4th at p. 416; see *People v. Nicolaus, supra,* 54 Cal.3d at p. 582 [the court may, within its sound discretion, exclude the hearsay basis of an expert's opinion].)

Here, the restriction the trial court placed on Dr. Pezdek's testimony was reasonable and within the court's discretion. The court permitted her to discuss, in general terms, the studies and reports upon which she relied in forming her opinions. It did not permit her, however, to testify to inadmissible hearsay contained within those reports and studies. This restriction was consistent with the law, and we fail to see how it constituted an abuse of discretion. (See *People v. Coleman* (1985) 38 Cal.3d 69, 92 [expert may not testify in detail to otherwise inadmissible matters on which she relied in forming her opinion], disapproved on another ground by *People v. Sanchez* (2016) 63 Cal.4th 665.)

We also do not agree that the restriction on Dr. Pezdek's testimony prevented Bishop from presenting critical expert testimony to support his defense. Despite the restriction, Dr. Pezdek testified in great detail regarding the factors that

affect the accuracy of eyewitness identifications and the best practices to follow when conducting photographic identifications. Dr. Pezdek also conveyed to the jury that her testimony and opinions were informed by her own research as well as research conducted by others. This was sufficient to allow the jury to understand and evaluate the soundness of her opinions. We find no merit to Bishop's conclusory assertions to the contrary.

VI. There Was No Prejudicial Prosecutorial Misconduct

Bishop contends the prosecutor committed prejudicial misconduct by maligning defense counsel and commenting on Defendants' failure to testify.[21] We disagree.

A. The Claims Are Forfeited

The Attorney General contends that Defendants forfeited their prosecutorial misconduct claims. We agree. "Ordinarily, the failure to object specifically on grounds of misconduct and to seek an admonition forfeits the claim unless an admonition would not have cured the harm." (*People v. Tully* (2012) 54 Cal.4th 952, 1037–1038; see *People v. Wilson* (2008) 44 Cal.4th 758, 800 ["To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection."].) As Bishop concedes, defense counsel did not object to any of the prosecutor's allegedly improper remarks. Moreover, the remarks were not so extreme that an admonition would not have cured any harm. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1002 (*Cunningham*).) Thus, Defendants forfeited the claims. Nonetheless, we will briefly consider the merits of the prosecutorial misconduct claims to forestall Defendants' related claims that their counsel provided

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[21] Harris joins these arguments.

ineffective assistance for failing to object to the prosecutor's remarks.

B. The Prosecutor Did Not Improperly Malign Defense Counsel

Bishop first contends that, during rebuttal, the prosecutor committed prejudicial misconduct by making disparaging remarks about defense counsel's character and integrity. Among other things, Bishop complains that the prosecutor told jurors that defense counsel was "lawyering," attempting to create a "smoke screen" and "muddy up the water," and so "desperate to attack the investigation . . . that accuracy literally gets thrown out the window." Bishop also complains that the prosecutor referred to defense counsel's arguments as "desperate," "ridiculous," and "delusional," and told the jury defense counsel does not "want you to use common sense and plug in the facts" and would blame the "sinking of the Titanic on [Detective] Gomez." Bishop insists these comments maligned defense counsel's character and implied that the defense was false, misleading, and contrived. We disagree.

A prosecutor's improper behavior constitutes a violation of the federal Constitution where it so infects the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Valdez* (2004) 32 Cal.4th 73, 122; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Conduct that does not render a defendant's trial fundamentally unfair under the federal Constitution may still be prosecutorial misconduct under state law when it involves the use of deceptive or reprehensible methods to persuade the court or the jury. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) "When the prosecution denigrates defense counsel, there is a risk the jury will shift its attention

from the evidence to the alleged defense improprieties. [Citations.] . . . . For defendant's claim to prevail on the merits we ask ' "whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Cash, supra*, 28 Cal.4th at pp. 732–733.) " 'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

Contrary to Bishop's characterizations, it is clear the prosecutor was not attacking defense counsel's character or integrity. Nor was she accusing counsel of fabricating a defense or otherwise deceiving the jury. Rather, the prosecutor was simply using colorful language to permissibly criticize defense counsel's tactics and arguments. (See *People v. Wharton* (1991) 53 Cal.3d 522, 567 [" 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'[.]" ' "]; *People v. Stitely* (2005) 35 Cal.4th 514, 559 [not misconduct for prosecutor to call defense counsel's arguments " 'ridiculous,' " " 'outrageous,' " and a " 'legal smoke screen' "]; *People v. Marquez* (1992) 1 Cal.4th 553, 576 [not misconduct to refer to a " 'heavy smokescreen that has been laid down [by the defense] to hide the truth' "]; *Cunningham, supra,* 25 Cal.4th at p. 1002 [not misconduct to comment that defense counsel's job is to " 'put up smoke, red herrings' "].) There is no reasonable likelihood the jury understood the prosecutor's remarks in an objectionable fashion. Consequently, there was no prosecutorial misconduct.[22]

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[22] Because the prosecutor's remarks were not improper, any objection to them would have been futile. Accordingly, we reject Defendants' claims that their trial counsel rendered ineffective

C. The Prosecutor Did Not Commit *Griffin* Error or Improperly Shift the Burden of Proof

Bishop next asserts the prosecutor committed *Griffin*[23] error and improperly shifted the burden of proof by commenting on Defendants' failure to testify at trial. In particular, he takes issue with the following remarks made by the prosecutor during rebuttal: "[W]e have evidence beyond a reasonable doubt to show that these two defendants had the evidence, they had the motive, that they . . . fled right after the crime because they didn't want to get caught trying to destroy and get rid of evidence. [¶] They were trying to hide evidence after the fact. [¶] They were involved in this from the get-go. [¶] But to have counsel get up here and argue that Larry [Bishop] went out of his way to destroy evidence—that was a quote from [Bishop's counsel's] argument. [¶] Did they explain why? [¶] Did they even say why Mr. Bishop tried desperately to get rid of evidence? [¶] Did they tell you why he did that? [¶] Did [Harris's counsel] tell you why he did that? [¶] Did [Harris's counsel] get up here and explain why Harris tried to get rid of evidence?" Bishop contends these remarks were designed to improperly capitalize on Defendants' failure to take the stand and provide an explanation for their actions, and conveyed to the jury that Defendants had the burden to prove their innocence. We disagree.

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assistance by failing to object or seek an admonition when the prosecutor made these remarks. (See *Cunningham, supra,* 25 Cal.4th at p. 1003.)

[23] *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

Griffin forbids either direct or indirect comment upon the failure of a defendant to take the witness stand. (See *People v. Hovey* (1988) 44 Cal.3d 543, 572.) Accordingly, "[t]he prosecutor's argument cannot refer to the absence of evidence that only the defendant's testimony could provide. [Citation.] The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citation.]" (*People v. Brady, supra,* 50 Cal.4th at pp. 565–566.)

Bishop suggests the prosecutor directly commented on Defendants' failure to testify when she remarked that "they" did not tell the jurors "why [they tried to destroy evidence]." When viewed in context, however, it is clear the prosecutor was referring to defense counsel, not Defendants. The remarks were a proper critique of the gaps in counsel's closing arguments; they were not a comment on Defendants' failure to testify at trial.

Bishop insists that, even if the prosecutor did not directly refer to Defendants' failure to testify, she did so implicitly since only Defendants could have explained why they tried to destroy evidence. We disagree. There was considerable circumstantial evidence from which defense counsel could have explained Defendants' motivations for their actions. Counsel, for example, could have argued Bishop wanted to ensure his friend who rented the Captiva, David M., would not be implicated in the crimes. Alternatively, defense counsel could have argued Defendants were motivated by a desire to help their fellow gang members. In support, counsel could have pointed to the gang expert's testimony that PDL members rise through the ranks of the gang by doing work on its behalf. To the extent this evidence was not sufficient, Defendants could have called their own experts to

explain why a gang member might become an accessory after the fact to a gang-related crime. The prosecutor did not explicitly or implicitly comment on Defendants' failure to testify. As such, she did not commit *Griffin* error.

Nor did the prosecutor commit misconduct by shifting the burden of proof. As noted above, the prosecutor's remarks were a proper critique of the gaps in defense counsel's closing arguments and theories of the case. They did not suggest, explicitly or implicitly, that Defendants bore the burden of proof on any issue. Even if the remarks could be construed in that manner, the trial court repeatedly instructed the jury that the prosecution bore the burden of proving every element of the case beyond a reasonable doubt. We presume the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Thus, there was no likelihood the jury misconstrued the prosecution's burden of proof.[24] (See *People v. Samayoa* (1997) 15 Cal.4th 795, 842 [rejecting a prosecutorial misconduct claim where defense counsel and the court unambiguously communicated to the jury the correct burden of proof].)

VII. The Court Did Not Err In Modifying CALCRIM No. 400 and Refusing Defendants' Request to Modify CALCRIM No. 401

Harris contends the trial court violated his state and federal constitutional rights when it modified the aiding and

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[24] Because the prosecutor's remarks were not improper, any objection to them would have been futile. Accordingly, we reject Defendants' claims that their trial counsel rendered ineffective assistance by failing to object or seek an admonition when the prosecutor made these remarks. (*Cunningham, supra*, 25 Cal.4th at p. 1003.)

abetting general principles jury instruction (CALCRIM No. 400), and refused to modify the aiding and abetting intended crimes jury instruction (CALCRIM No. 401).[25] We find no error.

A. Background

During a discussion of jury instructions, the court informed the parties it had modified CALCRIM No. 400 in light of a question from the jury in the first trial.[26] Specifically, the court inserted into the instruction the following language: "Thus, as to Counts One through Four, in order to convict either defendant of any offense charged in Counts One through Four, the jury must unanimously agree that such defendant is guilty of that offense beyond a reasonable doubt, but it need not decide unanimously by which theory he is guilty. Thus, the jury need not decide unanimously whether a defendant was a direct perpetrator or an aider and abettor, so long as it is unanimous that he was one or the other."[27]

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[25] Bishop joins this argument.

[26] In the first trial, the jurors indicated they were confused by the concept of aiding and abetting, with one juror asking, "how do we adjudicate on aiding and abetting if we can't determine who the perpetrator was?"

[27] The rest of the CALCRIM No. 400 instruction provided, "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he committed it personally or aided and abetted the perpetrator."

Defense counsel objected to the modification, arguing it was misleading and improper when considered with CALCRIM No. 401's instruction that "the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor." Counsel expressed concern that these instructions would permit the jury to find that anyone who is a PDL gang member and yelled "get them, blood" outside the laundromat is guilty. Counsel further argued the above-quoted language in CALCRIM No. 401 was unnecessary and confusing given the prosecution's theory of the case that both Defendants were present in the Captiva at the time of the crimes. The court rejected counsel's arguments and instructed the jury with the modified version of CALCRIM No. 400 and the unmodified version of CALCRIM No. 401.

B. Analysis

We independently review claims of instructional error. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.) In doing so, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jurors were misled as to the controlling law. (*People v. Tate* (2010) 49 Cal.4th 635, 696; *People v. Kelly* (1992) 1 Cal.4th 495, 525–526.) We presume the jurors were able to understand and correlate all of the instructions given. (*People v. Sanchez, supra,* 26 Cal.4th at p. 852.)

Harris concedes that CALCRIM No. 401 and the modified version of CALCRIM No. 400 correctly state the law on aiding and abetting. Nonetheless, he asserts that, when considered along with the gang expert's testimony suggesting PDL gang members shared knowledge and goals, the jury could have reasonably understood the instructions to mean they could

convict Defendants simply because they are PDL gang members. We find no reasonable likelihood the jury understood the instructions in this manner.[28]

The court's modification to CALCRIM No. 400 correctly informed the jury that it need not agree whether Harris was a direct perpetrator or an aider and abettor, so long as it is unanimous that he was one or the other. (See *People v. Wilson, supra,* 44 Cal.4th at p. 801.) It is not clear, and Harris does not explain, how the modification would lead the jury to believe it could convict Defendants simply because they are PDL gang members.

Nor do we think there was a reasonable likelihood the court's refusal to modify CALCRIM No. 401 invited the jury to misapply the law in such a manner. The instruction expressly informed the jury that, although an aider and abettor need not be present when the crime is committed, all the requirements for aiding and abetting must still be satisfied to convict a defendant under such a theory. Those requirements—which were set forth elsewhere in CALCRIM No. 401—would have precluded the jury from convicting Defendants simply because they are PDL gang members. Indeed, the instruction clearly explained that to

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[28] In support of this argument, Harris cites portions of juror declarations— submitted in connection with Defendants' motions for new trials—in which the jurors explained why they concluded Bishop was guilty. "Evidence of a juror's mental process—how the juror reached a particular verdict, the effect of evidence or argument on the juror's decisionmaking—is inadmissible." (*In re Boyette, supra*, 56 Cal.4th at p. 894 [citing Evid. Code, § 1150, subd. (a)].) Accordingly, we decline to consider those portions of the declarations.

convict Defendants under an aiding and abetting theory, the prosecutor had to prove (1) Defendants "knew the perpetrator intended to commit the crime," (2) "before or during the commission of the crime, [Defendants] intended to aid and abet the perpetrator in committing the crime" and (3) Defendants "did in fact aid and abet the perpetrator's commission of the crime." The instruction further explained that it is not sufficient that Defendants "fail[ed] to prevent the crime." Rather, Defendants must actually "aid, facilitate, promote, encourage, or instigate the perpetrator's commission of the crime." Considered as a whole, we find no reasonable likelihood the jurors understood these instructions in the manner Harris suggests.

VIII. The Court Did Not Err In Refusing to Instruct the Jury On the Crime of Accessory After the Fact

Harris contends the trial court abused its discretion and violated his right to due process when it declined to instruct the jury on the crime of accessory after the fact.[29] We disagree.

During a discussion of jury instructions, Defendants requested the court instruct the jury on accessory after the fact, despite neither defendant being charged with that crime. Harris argued the instruction was necessary because "the jurors could conceivably misconstrue an aider and abettor as including someone who helps dispose of the vehicle after the crime. That would be an erroneous interpretation of the law. And I think that the jurors should clearly understand the distinction between aiding and abetting and accessory after the fact." The court denied the request, explaining that the aiding and abetting instruction would not permit the jury to convict Defendants of the

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[29] Bishop joins this argument.

charged crimes simply because they disposed of the car after the shootings. The court further explained that defense counsel could argue to the jury the distinction between aiding and abetting and accessory after the fact.

As Harris acknowledges, accessory after the fact is a lesser related offense to murder, and a trial court is not required to instruct the jury of lesser related offenses, even if requested. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 486; *People v. Birks* (1998) 19 Cal.4th 108, 112–113.) Nonetheless, Harris contends the instruction was necessary because it was relevant to his theory of the case that he became involved in the crimes only after they were committed. He further argues that, without the instruction, there was a risk the jury would convict him solely because of his efforts to dispose of the Captiva. We disagree with both contentions.

During their closing arguments, defense counsel argued at length that Defendants' involvement in the crimes, if any, was limited to efforts to tow and repair the Captiva. Counsel also repeatedly informed the jury that if it found Defendants' involvement occurred only after the crimes were committed, they could not be convicted as aiders and abettors. This was sufficient to fully apprise the jury of Defendants' theories of the case. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 213.)

Moreover, consistent with defense counsel's arguments, the court instructed the jury with CALCRIM No. 401, which informed the jury that to be guilty of the charged crimes under an aiding and abetting theory, Defendants must have formed the requisite intent before or during commission of the crime, and their words or conduct must have aided and abetted the commission of the crime. We presume the jury followed these

instructions (*People v. Sanchez, supra*, 26 Cal.4th at p. 852), which clearly conveyed that Defendants could not be convicted on an aiding and abetting theory solely based on their actions after the commission of the charged crimes. Under these circumstances, the trial court was not required to instruct the jury on accessory after the fact. (See *People v. Mora and Rangel*, *supra,* 5 Cal.5th at pp. 486–487; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 213.)

IX. The Court Did Not Err in Failing to Give a Unanimity Instruction

Bishop contends the trial court violated his state and federal rights to due process and a unanimous jury verdict by failing to give a unanimity instruction.[30] Specifically, he contends the court was required to instruct the jury that, if it determined he was not the perpetrator of the murder and attempted murder, it had to unanimously agree on which particular act or acts he committed to aid and abet those crimes. We disagree that such an instruction was required.

"In a criminal case, a jury verdict must be unanimous." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) Accordingly, when the evidence suggests more than one discrete crime, the prosecutor must elect among the crimes or the court must require the jury agree on the same criminal act. (*Ibid*; *People v. Jennings* (2010) 50 Cal.4th 616, 679.) However, "where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the

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[30] Harris joins this argument.

'theory' whereby the defendant is guilty." (*Russo, supra*, 25 Cal.4th at p. 1132.) "In deciding whether to give [a unanimity] instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id*. at p. 1135.) We independently review a claim that the trial court erroneously failed to give a unanimity instruction. (*People v. Lueth* (2012) 206 Cal.App.4th 189, 195.)

Bishop insists a unanimity instruction was required because the prosecutor presented evidence that he committed multiple acts of aiding and abetting, and the jury may have convicted him despite disagreeing as to which of those acts he committed.[31] The California Supreme Court rejected a similar argument in *Russo, supra,* 25 Cal.4th 1124. In that case, the defendant was convicted of conspiracy to murder, which required proof that one of the conspirators committed an overt act in furtherance of the conspiracy. The prosecutor alleged the defendant and his co-conspirators committed 10 overt acts, and the defendant argued the jury had to unanimously agree which one of those acts was committed. The California Supreme Court disagreed, reasoning that "[a]lthough the jury had to find at least

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[31] According to Bishop, the evidence suggested he may have aided and abetted the crimes by shooting a gun from inside the Captiva, or alternatively by yelling "get them, blood" outside the laundromat. Harris contends the evidence additionally showed he could have aided and abetted the crimes by calling the tow truck company and auto body shop.

one overt act, whether it was one or another of several possible acts only concerns the way in which the crime was committed, i.e., the theory of the case, not whether discrete crimes were committed. Thus, if the jurors disagreed as to what overt act was committed, and agreed only that *an* overt act was committed, they would still have unanimously found defendant guilty of a particular conspiracy. No danger exists that some jurors would think she was guilty of one conspiracy and others would think she was guilty of a different one." (*Id.* at p. 1135.)

The same is true here. The prosecution presented evidence of two discrete crimes: the murder of Victor M. and the attempted murder of Damion T. Although each juror had to find that Bishop aided and abetted the commission of those crimes in some manner (assuming the juror found he was not the perpetrator), the precise actions that constituted aiding and abetting concerned the theory of the case, and not whether the murder and attempted murder were committed. Thus, even if the jurors disagreed as to how Bishop aided and abetted the crimes, so long as they agreed he did aid and abet them in some manner, the jurors would have unanimously found him guilty of the same murder and attempted murder. The court was not required to give a unanimity instruction under these circumstances.[32] (See *Russo, supra*, 25 Cal.4th at pp. 1135–1136; *Schad v. Arizona* (1991) 501 U.S. 624, 631–632 [" 'Plainly there is

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[32] In fact, it was not even necessary that the jurors unanimously agreed on whether Bishop was an aider and abettor or the direct perpetrator. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1025.) So long as each juror found he was one or the other, they would have unanimously found him guilty of the same crimes.

no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.' "].)

X. The Court Did Not Err In Its Response to a Question From the Jury

Bishop contends the trial court breached its sua sponte instructional duty and violated his due process rights by failing to properly respond to a jury question. We find no error.

Victor S., who towed the Captiva to B & K Auto, told police that when he met Bishop for the first time, Bishop said he had to retrieve the Captiva key from Pasadena. During deliberations, the jury submitted a note to the court asking, "In Victor [S.'s] testimony, does he ever mention that Larry Bishop went to Alta Dena [*sic*] to pick up the Captiva key?" Bishop requested the court respond to the question by reading to the jury the relevant portions of Victor's testimony, which he argued would avoid creating a negative inference that Bishop had the key with him at all times. The court indicated it was concerned about creating such an inference, but it also did not want to inject itself into the jury's deliberations. The court responded to the jury's question with a simple "no."

Bishop argues the court's response was "erroneous" and misled the jury because it implied he possessed the Captiva key when he first met Victor S. He contends the response therefore violated section 1138, which requires the court provide jurors certain requested information and help them understand the legal principles they are asked to apply.[33] (*People v. Beardslee*

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[33] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them

(1991) 53 Cal.3d 1179A, 97.) Bishop further contends the court's response diluted the prosecution's burden of proof. There is no merit to either contention.

Contrary to Bishop's claim, the court's response to the jury's question was not "erroneous": Victor S. told police that Bishop said the key was in Pasadena, not Altadena. Nor do we think the response was misleading. The jury's question could reasonably be interpreted as asking whether Bishop said the key was specifically in Altadena, as opposed to some other location. The jury's focus on Altadena would have made sense. At trial, defense counsel argued that Edward M., who lived in Altadena, was involved in the shootings and directed Bishop to put a cover on the Captiva while it was parked in Eagle Rock. If the key was in Altadena, the defense's theory of the case was more likely. The court's simple response to the jury's question would have helped it resolve that issue. Had the court instead read back the relevant portions of Victor S.'s testimony, as Bishop requested, it risked implying to the jury that the reference to Pasadena had particular significance. We think the court acted appropriately under the circumstances. It did not violate section 1138 or dilute the prosecution's burden of proof.

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into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

XI. California's Death Penalty Law Is Not Unconstitutional

Bishop asserts the drive-by shooting special circumstance finding must be vacated because California's death penalty law is unconstitutional.[34] We disagree.

The Attorney General argues that Defendants lack standing to challenge the constitutionality of the death penalty law since the prosecution did not seek the death penalty and Defendants were not sentenced to death. Bishop insists that, despite these facts, he is "permitted to argue as a matter of statutory construction that the special circumstance violates the Eighth Amendment if applied in a death penalty case, since the construction of the special circumstance in his case must be consistent with its construction in a capital case." We will assume, for the sake of argument, that Defendants have standing. Nevertheless, we find their claims lack merit.

Bishop contends that, due to the sheer number and scope of special circumstances, California's death penalty law fails to sufficiently narrow the class of death-eligible persons. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 [to pass constitutional muster, a capital sentencing scheme must narrow the class of persons eligible for the death penalty]; see also *Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [a state's death penalty law must be tailored and applied in a manner that avoids arbitrary and capricious infliction of the death penalty].)
The California Supreme Court, however, has repeatedly rejected such arguments. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Harris* (2005) 37 Cal.4th 310, 365; *People v.*

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[34] Harris joins this argument.

Boyette (2002) 29 Cal.4th 381, 439; *People v. Bolin* (1998) 18 Cal.4th 297, 345.) Bishop nonetheless urges us to reexamine the issue, purportedly because the number of special circumstances has since increased and it is "now hard to find any first degree murder which does not fall under at least one of the special circumstances." Bishop, however, " 'has not demonstrated on this record, or through sources of which we might take judicial notice, that his claims are empirically accurate, or that, if they were correct, this would require the invalidation of the death penalty law.' [Citation.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 541.) Accordingly, we follow the binding authority from the California Supreme Court and decline Bishop's invitation to declare California's death penalty law unconstitutional.

Bishop next asserts that the drive-by shooting special circumstance (§ 190.2, subd. (a)(21)) in particular is unconstitutional because it duplicates the elements of drive-by first degree murder (§ 189). As Bishop concedes, however, this precise argument was rejected in *People v. Rodriguez* (1998) 66 Cal.App.4th 157, and similar claims have been repeatedly rejected by the United States Supreme Court and California Supreme Court. (See *Lowenfield v. Phelps, supra*, 484 U.S. at p. 246; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, fn. 12 [finding meritless the argument that "lying-in-wait special circumstance is constitutionally infirm because it duplicates an element of first degree murder"]; *People v. Gamache* (2010) 48 Cal.4th 347, 406 [the felony-murder special circumstance is constitutional despite having essentially identical elements to felony murder]; *Catlin, supra,* 26 Cal.4th at p. 158 ["first degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth

Amendment"].) Rather than distinguish these cases, Bishop simply asserts he is seeking to preserve this issue for further review. Accordingly, we follow these authorities, which we find persuasive, and reject Bishop's claim.

XII. Bishop's Sentence Does Not Constitute Cruel and/or Unusual Punishment

Bishop argues that, because he was only 20 years old at the time of the murder, his mandatory sentence of life without the possibility of parole (LWOP) violates the state and federal constitutional bans on cruel and/or unusual punishments. He insists that, in order to pass constitutional muster, the trial court was required to consider whether his age was a sufficiently mitigating factor to warrant a lesser sentence. We disagree.

The Attorney General contends that Bishop forfeited his claim by failing to raise this issue in the trial court. Bishop concedes he did not raise the issue below, but insists we may consider it for the first time on appeal because it presents a pure question of law and his sentence "could not lawfully be imposed under any circumstances in the particular case." We disagree with both contentions. As Bishop acknowledges, even juvenile offenders may receive LWOP sentences under certain circumstances. (See *Miller v. Alabama* (2012) 567 U.S. 460, 479 (*Miller*).) Moreover, "[a] claim that a sentence is cruel or unusual usually requires a 'fact specific' inquiry." (*People v. Baker, supra,* 20 Cal.App.5th at p. 720.) Bishop's claim is no exception; it is premised on the factual assertion that the prefrontal cortex of his brain was not fully developed, which purportedly rendered him less culpable for his crime than if he had been a mature adult. Accordingly, Bishop's failure to raise this issue in the trial court has forfeited it on appeal. (See *People v. Baker* (2018) 20

Cal.App.5th 711, 720 ["A claim that a sentence is cruel or unusual . . . is forfeited if not raised below."]; *People v. Speight* (2014) 227 Cal.App.4th 1229, 1247 ["A defendant's failure to contemporaneously object that his sentence constitutes cruel and unusual punishment forfeits the claim on appellate review."].)

Even if the claim was not forfeited, we would reject it on the merits. In recent years, the United States Supreme Court has circumscribed the range of possible sentences for juvenile offenders under the Eighth Amendment prohibition against cruel and unusual punishments. Under these cases, "(1) no individual may be executed for an offense committed when he or she was a juvenile (*Roper* [*v. Simmons* (2005) 543 U.S. 551, 578 (*Roper*)]); (2) no juvenile who commits a nonhomicide offense may be sentenced to [life without parole] (*Graham* [*v. Florida* (2010) 560 U.S. 48, 74 (*Graham*)]; and (3) no juvenile who commits a homicide offense may be automatically sentenced to [life without parole] (*Miller*[, *supra*, 567 U.S. at pp. 476–477)]." (*People v. Franklin* (2016) 63 Cal.4th 261, 273–274).) These cases were based on the observation that "children are 'constitutionally different . . . for purposes of sentencing.' " (*Id.* at p. 274.)

We reject Bishop's suggestion that this reasoning applies to his current offense, which he committed when he was 20 years old. As Bishop acknowledges, a line has been drawn at the age of 18 to separate juveniles from adults for Eighth Amendment purposes. (See *Graham, supra,* 560 U.S. at pp. 74–75 [drawing line at age of 18 for life without parole for nonhomicide crimes]; *Roper, supra*, 543 U.S. at p. 574 ["The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."]; see also *People v.*

Contreras (2018) 4 Cal.5th 349, 371 [*Graham* drew " 'clear line' " at age 18 for juvenile and adult offenders]; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380 [U.S. Supreme Court has drawn line at 18 years old in Eighth Amendment jurisprudence].) We decline to redraw that line to encompass Bishop's current crime. (See *People v. Windfield* (2016) 3 Cal.App.5th 739, 766 [refusing to extend *Miller* to defendant who was 18 years old at time of crime], rev. granted S238073 (Jan. 11, 2017); *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [refusing to apply *Graham* and *Miller* to defendant who was 18 years and five months old at time of crime].)

XIII. The Cumulative Effect of the Errors Does Not Warrant Reversal

Defendants contend their convictions must be reversed due to the cumulative effect of the errors. "Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to defendant absent a combination of errors." (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216.) "A claim of cumulative error is in essence a due process claim and is often presented as such [citation]. 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' [Citation.]" (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.) Because we have found, at most, only two non-prejudicial instances of juror misconduct, we reject Defendants' claims that their convictions must be reversed for the cumulative effect of the errors.

XIV. Remand Is Necessary For the Trial Court to Consider Whether to Strike the Firearm Enhancements

Defendants contend, and the Attorney General concedes, that their cases must be remanded for resentencing to permit the trial court to exercise its discretion to strike the firearm enhancements it imposed. We agree.

Pursuant to section 12022.53, subdivision (d), Bishop's sentence included firearm enhancements of 25 years to life on counts 1 and 2, and Harris's sentence included firearm enhancements of 25 years to life on counts 1 through 4.[35] At the time Defendants were sentenced, the trial court had no discretion to strike the firearm enhancements. On January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect, which amended section 12022.53, subdivision (h), to remove the prohibition against striking the firearm enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss a firearm enhancement imposed under section 12022.53, subdivision (d). (Stats. 2017, ch. 682, § 2.)

The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Here, Defendants' convictions were not final as of January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 ["[A] defendant generally is entitled to benefit from amendments that become effective while his case is on appeal."]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465

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[35] The court stayed under section 654 the enhancements on counts 3 and 4.

["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].) Accordingly, the trial court must be given the opportunity to consider whether to strike the firearm enhancements.

On remand, the trial court also has discretion to strike only the punishment for the enhancements. (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the firearm enhancement will remain in the defendant's criminal record.

XV. There Are Numerous Errors In the Abstracts of Judgment

Defendants contend their abstracts of judgment contain numerous errors. We agree. Specifically, the abstracts of judgment reflect $10 crime prevention fines (§ 1202.5) and $300 parole revocation fines (§ 1202.45) that the court did not impose and was not authorized to impose.[36] (See § 1202.5, subd. (a) [listing the convictions for which a crime prevention fine may be imposed]; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1184–1185 [parole revocation fine unauthorized where defendant sentenced to life without the possibility of parole]; *People v. McWhorter* (2009) 47 Cal.4th 318, 380 [parole revocation fine unauthorized where imposed on a determinate term that was stayed].) They also fail to reflect the court's order that the $5,000 in victim restitution be paid jointly and severally. Further, Bishop's abstract of judgment fails to reflect the court's finding that he is entitled to 1,569 days of actual presentence custody credit. Because we are remanding the case for resentencing, we will not modify the abstracts of judgment to correct these errors. The trial court, however, should be mindful of them at resentencing and in preparing the amended abstracts of judgment.

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[36] The Attorney General concedes these errors as to Harris, but insists the court was required to impose the fines on Bishop in connection with a separate burglary conviction for which the court simultaneously sentenced him. While that may be true, the abstract of judgment on which the fines appear reflect only Bishop's convictions in this case.

DISPOSITION

We remand the matters for resentencing to allow the trial court to consider whether to strike the firearm enhancements pursuant to section 12022.53, subdivision (h). Following resentencing, the court shall issue amended abstracts of judgment and forward them to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

WILEY, J.